IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

APPELLANTS' REPLY BRIEF

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I.

In its Brief, the State of Georgia expresses the view that Ga. Code Ann. §59-106, which authorizes jury commissioners to select for jury service only persons whom the commissioners believe are "intelligent and upright", provides sufficiently precise guidance as to which "citizens of the County" are to be included and which excluded from the jury list. In support of this conclusion the state quotes a decision of the Supreme Court of Georgia ("An intelligent person is one possessed of ordinary information and reasoning facilities," *Sullivan* v. *State*, —— Ga. ——. 168 S.E.2d 133 (1969)) and the chairman of the jury commission who testified that an "upright" citizen is one who enjoys a good reputation in the community (Brief p. 16).

It is also urged that the English language always contains room for varying interpretations, and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment contain language more indefinite than Ga. Code Ann. §59-106.

Appellants have no quarrel with the general notion that some uncertainty as to meaning is inevitable in the drafting of legislative enactments. It is quite another matter, however, to conclude that officials such as jury commissioners can non-arbitrarily distinguish between adults on the basis of whether they are "intelligent and upright"—statutory tests which are nowhere given content or objectively defined. Assuming good faith on the part of the commissioners—an assumption which this record refutes—neither the statute, the practice of the commissioners under it, nor decisions of the Georgia courts, adopt standards for exclusion or inclusion which do more than reiterate the open-ended, subjective, discretion conferred by the words, "intelligent and upright." Cf. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The statute simply does not offer guidance to assist one determining whether any particular individual is qualified for jury service. Guidance to assist one determining whether particular individuals are qualified for jury service is not given by replacing one set of vague and overbroad terms with another.[1] What, for example, is one to make of the notion that a Georgia juror is "intelligent" if possessed of "ordinary information"

[1] Even the dictionary definition of "intelligence" reflects some of the confusion encountered by any definition which does not rely on an objective standard: "Psychologists still debate the question whether intelligence is a unitary characteristic of the individual or a sum of his abilities to deal with various types of situation." Webster's New International Dictionary (2d Ed.).

The word "upright" is defined by Webster's as being "morally correct." A standard more likely to reflect the prejudices of the person making the selection is difficult to imagine.

and "upright" if "honorable, honest and will do right as he sees it"?[2] *Sullivan* v. *State, supra* at 137. The Georgia Supreme Court opinion in *Sullivan* v. *State* also states that "No particular degree of intelligence is required by this statute. Idiots, morons, and insane persons are not intelligent and would not qualify." There is no suggestion, however, that §59-106 excludes only the classes of mentally disabled persons enumerated. And the statute betrays no such intent, although it would be an easy matter to write a statute which confined the discretion of the commissioners to excluding such classes of persons from service, see e.g., North Carolina Gen. Stat. §9-3 (1967); Ala. Code Tit. 30 §21 (1966). Perhaps, the failure of the Georgia Legislature to define those characteristics which amount to a disqualification might pass constitutional muster if the commissioners themselves, or the Georgia courts, construed Ga. Code Ann. §59-106 in a more definite manner—as, for example, this Court construes the Fourteenth Amendment. But nothing of this sort has occurred and Ga. Code Ann. §59-106 remains as vague and over-broad as when it was written. (See A. 36).

Another branch of the State's argument is that a statute may not be invalidated because of a capacity for wrongful administration attributable to its vagueness or overbreadth.

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[2] The Georgia Supreme Court in *Sullivan* also relies on a passage in this Court's opinion in *Brown* v. *Allen*, 344 U.S. 443, 474 (1953) to the effect that to satisfy federal constitutional requirements a jury sleection statute need only reflect "the cross-section of the population suitable in character and intelligence for that civic duty." The court takes this to mean that a statute which uses the words "intelligent" and "upright" is thereby constitutional. In doing so it confuses the constitutionally acceptable goal of seeking jurors of intelligence and character (as stated in *Brown* v. *Allen*) with the means of reaching that goal which, to satisfy Fourteenth Amendment requirements, must contain a sufficiently definite test of eligibility not to invite capricious distinction between individuals or to serve as a mask for racial discrimination.

It is said that all statutes are capable of wrongful administration, and, therefore, that the only remedy for the use of language such as "intelligent and upright" to exclude Negroes in Georgia from jury service is to obtain injunctive relief in every case against particular jury commissioners who discriminate racially. We will not here repeat our discussion of the reasons why the language of Ga. Code Ann. §59-106 provides a particular and severe threat to nonracial selection of jurors in Georgia, or the reasons why a general injunction against racial selection is of minimal value as long as excessive discretion vested in the commissioners provides an easy justification for what is actually racial exclusion. These matters are set forth in some detail in Appellants' Brief, pp. 30-37. We point out, however, that the rule that a statute violates the Fourteenth Amendment when it confers standardless discretion upon public officials to make up the "law" in every case has been consistently applied by this Court, See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313 (1966); *Hague* v. *CIO*, 307 U.S. 406 (1939). Indeed, the State's contention was rejected by the Court in *Louisiana* v. *United States*, 380 U.S. 145, 153 (1965):

> The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See, e.g., *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 65 L.ed. 516 41 S Ct 298, 14 ALR 1045. Squarely in point is *Schnell* v. *Davis*, 336 U.S. 933, 93 L.ed 1093, 69 S Ct 749, affirming 81 F. Supp. 872 (D.C. S.D. Ala.), in which we affirmed a district court judgment striking down as a violation of the Fourteenth and Fifteenth Amendments an Alabama constitutional pro-

vision restricting the right to vote in that State to persons who could "understand and explain any article of the Constitution of the United States" to the satisfaction of voting registrars. We likewise affirm here the District Court's holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to "understand and give a reasonable interpretation to any section" of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found both in the Fifteenth Amendment and 42 USC §1971 (a) to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws.

As with voting registrars in Louisiana, use by the commissioners of indefinite eligibility tests to exclude Negroes from jury service is not merely an abstract possibility. Georgia jury commissioners in Taliaferro County and elsewhere have consistently misapplied their authority for the forbidden purpose of excluding Negroes.[3] *Cobb* v. *Georgia*, 389 U.S. 12 (1967) (per curiam) (Bibb County); *Sullivan* v. *Georgia*, 390 U.S. 410 (1968) (per curiam) (Lamar County); *Anderson (and Hinton)* v. *Georgia*, 390 U.S. 206 (1968) (per curiam) (Crisp County); *Jones* v. *Georgia*, 389 U.S. 24 (1967) (per curiam) (Bibb County); *Sims* v. *Georgia*, 389 U.S. 404 (1967) (per curiam) (Charl-

[3] Of course, use of the "intelligent and upright" qualification is not the only manner by which Georgia jury commissioners have discriminated against blacks in jury selection. Until recently, commissioners also employed racially separate tax books to discriminate in selection. The point is that the "intelligent and upright" qualification provided a ready opportunity for discrimination which Georgia jury commissioners are inclined to take advantage of by custom and practice.

ton County); *Whitus (and Davis)* v. *Georgia,* 385 U.S. 545 (1967) (Mitchell County); *Reece* v. *Georgia,* 350 U.S. 85 (1956) (Cobb County); *Williams* v. *Georgia,* 349 U.S. 375 (1955) (Fulton County); *Avery* v. *Georgia,* 345 U.S. 559 (1953) (Fulton County); *Vanleeward* v. *Rutledge,* 369 F.2d 584 (5th Cir. 1966) (Muscogee County); *Whippler* v. *Dutton,* 391 F.2d 425 (5th Cir. 1968) (Bibb County); *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964) (Jasper County); *Pullum* v. *Greene,* 396 F.2d 251 (5th Cir. 1968) (Terrell County); *Moore* v. *Dutton,* 396 F.2d 783 (5th Cir. 1968) (per curiam) (Camden County); *Whippler* v. *Balkcom,* 342 F.2d 388 (5th Cir. 1965) (Bibb County); *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964) (Mitchell County); *Gamble* v. *Grimes,* XIA Race Rel. L. Rep. 2028, (N.D. Ga. 1966) (Fulton County); *Broadway* v. *Culpepper,* —— F. Supp. —— (No. 904, M.D. Ga. 1969) (Baker County).[4]

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[4] The requirement that Georgia jurors be intelligent and upright apparently dates from the Georgia Constitution of 1868 which authorized the General Assembly to "provide by law for the selection of upright and intelligent persons to serve as jurors." One year after adoption of the Constitution of 1877 (which authorized "the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors".) Georgia adopted "An Act to carry into effect Paragraph 2, Section 18, Article 6 of the Constitution of 1877 so as to provide for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and of intelligent and upright men to serve as traverse jurors and for the drawing of juries." (Acts 1878-79, pp. 34-35)

It is of course significant that the intelligent and upright requirement came into Georgia law at a time when southern states freely adopted vague and overbroad laws as "nothing more than a mask for excluding the names of any and all Negroes." See Carter, Scottsboro (Louisiana State University Press (1969)) pp. 196-97; *Louisiana* v. *United States,* 380 U.S. 145 (1965); *United States* v. *Mississippi,* 380 U.S. 128 (1965). Of the political situation in Georgia, in 1868, a distinguished historian has written "In September, 1868, the Georgia Legislature formally declared all Negro members ineligible to sit in that body . . . No other former confederate state put on such a display of incorrigibility." Franklin, J. H., Reconstruction After the Civil War (University of Chi. Press (1961)) pp. 131-133.

The general injunction against racial discrimination which the district court granted, and which appellees contend is sufficient, cannot eliminate persistent discrimination on such a scale. As the Court recognized in *Louisiana* v. *United States,* 380 U.S. at 152, a vague and overbroad statute "practically places . . . [the commissioners] decision beyond the pale of judicial review." Nor are proper jury selection standards difficult to ascertain and administer. See 1968 Jury Selection and Service Act, Public Law No. 90-273, 28 U.S.C. §§1861 et seq. The suggestion in the State's Brief (p. 13) that 28 U.S.C. §1865 gives a federal judge similar power to a Georgia jury commissioner is unpersuasive. Under the Jury Selection and Service Act, the requirement that one must "read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form", 28 U.S.C. §1865 (b) (2), is a determination made on the objective basis of "information provided on the juror qualification form and other competent evidence" 28 U.S.C. §1865 (a).[5] Appellees further contention that somehow Georgia's subjective eligibility standards are required by the Sixth and Seventh Amendment falls of its own weight. Appellants do not contend that a state cannot ensure that its jurors are qualified for the work at hand, but rather that the standard used to select eligible jurors must be sufficiently clear to provide for minimum regularity and accountability. The adoption of words such as "intelligent and upright", as to which each person may have a different view, does not satisfy the Fourteenth Amendment for it leaves a citizen's eligibility to the

[5] Appellees overlook that the Federal Jury Selection and Service Act requires that each circuit adopt a plan of selection which will ensure objective random selection rather than the subjective character and intelligence judgments which were permitted by prior law. See United States Code Congressional and Administrative News, 90th Congress, 2nd Sess., pp. 748-763.

"passing whim or impulse" of a jury commissioner, *Louisiana* v. *United States, supra* at 380 U.S. 153.

II.

Neither the State of Georgia, nor remaining appellees, make an attempt to deny that racial discrimination infected the process of selection of Taliaferro County school board members prior to the institution of this litigation. Appellees appear to contend, however, that appellants are not entitled to relief because a Negro was appointed to fill one of two vacancies on the five-man school board and his appointment was later ratified, as required by Ga. Code Ann. §2-6801, by a recomposed grand jury.

The short answer to appellees' contention is that Negroes were excluded in the selection of the new grand jury which filled the two vacancies. (See Appellants' Brief pp. 25-38). But even if the two vacancies had been filled by a constitutionally selected body, this would not have remedied the undoubted unconstitutional selection of the remaining three school board members for they were selected by the previous grand jury—from which Negroes were excluded in even more gross fashion than on the recomposed grand jury. At a minimum, then, the district court should have declared that the school board was selected in violation of the Fourteenth Amendment, ordered its membership vacant, and required the entire board selected on a non-racial basis, *Bell* v. *Southwell,* 376 F.2d 659 (5th Cir. 1967). Nor were striking down the offensive system of selection or vacating the membership of the board the only remedies available to the district court. Given the situation in Taliaferro County where an all-white board administered an all-Negro school system, the district court could have—if it found such relief temporarily warranted to

remove the past effects of discrimination—"appropriately restricted control of the school to Negro parents until whites demonstrated the kind of good faith which would render their participation no longer a danger to Negroes, say by reversing the withdrawal of their children from the system." (Appellants' Brief pp. 45-48); cf. *Carr* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). Or the district court could have reappointed a receiver to operate the public schools, a step which it had found necessary in earlier litigation between members of the Negro community and public officials in this county. *Turner* v. *Goolsby,* 255 F. Supp. 724 (S.D., Ga., 1965). The district court failed to select one, or several, of these courses because it concluded—erroneously, appellants contend—that the addition of one Negro member to the school board was sufficient to reform an unconstitutional system of selection which enables whites to control a school system that no white children attend.

It should be noted the county school board appointment process begins when a superior court judge appoints the six jury commissioners responsible for selection of the jury lists. Candidates for superior court judgeships are nominated and elected by the voters of Taliaferro County in addition to the voters of five other counties, Ga. Code Ann. §24-2501, 2-3802. (Prior to 1966 the superior court judges were elected by all the voters of the State, see *Stokes* v. *Fortson,* 234 F. Supp. 575 (N.D. Ga. 1964). The result is that at no point in the system do Taliaferro Negroes have an "effective voice" in the process of school board selection, for the official (the superior court judge) whose appointments (of jury commissioners) determine who will select the school board is only remotely responsible to Taliaferro county black voters. *Cf. Kramer* v. *Union Free School District No. 15,* 395 U.S. 621, 627 n. 7,

628-29; *Avery* v. *Midland County Texas,* 390 U.S. 474, 484 (1968).

Appellees also appear to dispute that the district court should initially fashion the particular relief appropriate to remedy the effects of past discrimination in selection of the school board. The general practice, however, has been to leave matters of this sort to the discretion of the district court in the first instance. *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968); *Griffin* v. *School Board of Prince Edward County, Virginia,* 377 U.S. 218 (1964); *Powell* v. *McCormack,* 395 U.S. 486, 550 (1969). Given the district court's familiarity with the operation of the school system in the county, there is no reason why a different practice should apply here.

III.

This Court's decisions last term in *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969) and *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969), make perfectly plain that Article VII, §V, Par. 1 of the Georgia Constitution and Ga. Code Ann., §§2-6801; 32-902, 902.1 violate the Fourteenth Amendment by excluding from membership on a Georgia school board persons who do not own real property. Cf. *Williams* v. *Rhodes,* 393 U.S. 23 (1968).

In *Kramer,* a New York statute denied the right to vote in a school board election only to those who were not owners or lessees of real property within the district or parents and guardians of school children. Nevertheless, the statute violated the Equal Protection Clause because there was no proof that it was necessary to promote a compelling state interest, and no showing that the persons permitted to vote had any greater interest in school affairs than those who were not permitted to vote. In *Cipriano,* the city main-

tained that real property owners had a special interest in an election held to approve the issuance of a municipality's utility revenue bonds (because property values were affected by the outcome) and that this interest was sufficient to warrant exclusion of others. In striking down the Louisiana constitutional provision involved, this Court held that all utility users—not only property owners—were affected by the character of utility service.

As appellants read the State's Brief, Georgia has declined to state a specific justification for the exclusion of non-freeholders from school board membership such as that freeholders are "directly affected", *Kramer, supra* 395 U.S. at 631, or that they have a "special pecuniary interest" in the operation of the schools which others do not have, *Cipriano, supra,* 395 U.S. 704. The state concedes that "the desirability and wisdom of the 'freeholders' requirements for state or county political office may be indeed open to question" (p. 26) and merely asserts the right of a legislature to impose property qualifications if it wishes. Indeed, because the Georgia law reflects no attempt to non-arbitrarily restrict service to those affected, such an attempt to justify the exclusion would fail. While it might, at most, be argued that a property owner has an infinitesimally greater financial interest in the costs of the school system than a non-property owner, any parent plainly has a far greater concern in board membership than any non-parent, regardless of whether he is a freeholder. Georgia law, however, makes eligible only those parents who own real property.

The state also argues that the constitutionality of the freeholder restriction is not justiciable. The district court, however, granted the petition for intervention, without objection from appellees, of a non-freeholder and father of six school children who was barred from selection to the

school board expressly in order to resolve the constitutionality of the freeholder requirement (A. 370-71; 72, 73).

The remaining appellees argue that property owners have the capacity to deal with the duties of school board office which non-property owners do not possess:

> "a person having such fiscal responsibilities should have the qualification of having acquired some property himself." (Brief p. 11)

This argument simply does not stand examination in light of the facts of contemporary life, for "some property" need not mean real property. Men and women exercise considerable fiscal responsibilities, both in public and private life, without ownership of real property. Similar to the non-property owners disfranchised in *Cipriano* and *Kramer*, non-property owners in Georgia feel the impact of the operation of the public schools and are entitled to a voice in their operation, regardless of whether they are real property owners. Moreover, the state's Brief exposes the fact that the freeholder qualification does not even serve the limited purpose the remaining appellees seek to employ as its justification:

> . . . it would still seem that an individual who was a serious aspirant for the office of county school board member would be able to obtain a conveyance of the single square inch of land he would require to become a "freeholder." (Brief p. 26)

The notion the freeholder requirement should be upheld because one could become a freeholder by acquiring a "single square inch" of land demonstrates that the requirement need not serve the purpose of ensuring qualified public school board members which remaining appellees claim for it. Rather it prohibits those non-property owners

who do not wish to submit to such chicanery from being selected as school board members. As the freeholder requirement plainly discriminates against the poor without satisfying a compelling state interest, it violates the Equal Protection Clause of the Fourteenth Amendment.

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